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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SACHIKO MUROMURA,) Case No. CV 12-09263 DDP (AGRx)
)
Plaintiff,)
) **ORDER GRANTING DEFENDANTS' MOTION**
v.) **TO DISMISS**
)
RUBIN POSTAER AND)
ASSOCIATES, a California)
corporation; AMERICAN HONDA)
MOTOR CO., INC., a Delaware)
corporation,)
)
Defendants.) [Dkt. No. 46]
)
_____)

Presently before the court is Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint. Having considered the submissions of the parties and heard oral argument, the court grants the motion and adopts the following order.

I. Background

As discussed in this court's prior orders, Plaintiff Sachiko Muromura creates artistic works using a magnetic fluid ("ferrofluid"). (Second Amended Complaint ("SAC") ¶ 15.) Muromura makes ferrofluid sculptures, takes photographs and videos of the sculptures, and often projects images of the sculptures onto a

1 screen. (Id.) Among Muromura's artistic creations is an
2 audiovisual work entitled "Protrude Flow" which she created in
3 collaboration with Plaintiff Minako Takeno.¹ (Id. ¶ 16.) Muromura
4 subsequently created and copyrighted an audiovisual work entitled
5 "Protrude Flow, 2001." (Id. ¶¶ 17-18.) The work does not readily
6 lend itself to written description, but generally depicts
7 ferrofluid forming a series of shapes and patterns in response to
8 magnets. The "Protrude Flow, 2001" video, and still images from
9 the movie, were displayed at a computer graphics exhibition in Los
10 Angeles in 2001. (Id. ¶ 17.)

11 Defendant Rubin Postaer and Associates ("RPA") is an
12 advertising agency that did work for Defendant American Honda Motor
13 Company ("Honda"). (SAC ¶ 19.) In 2009, an RPA employee asked
14 Muromura (hereinafter, "Plaintiff") if any of her ferrofluid
15 artworks were available for a multi-city tour highlighting Honda's
16 use of ferrofluids in its vehicles. (Id.) Plaintiff provided RPA
17 with a link to her website, which included images and video of
18 "Protrude Flow, 2001." (Id.) RPA ultimately rented one of
19 Plaintiff's two available works and paid Plaintiff a \$10,000 rental
20 fee. (Id. ¶ 20.)

21 In March 2010, people familiar with Plaintiff's work informed
22 her that a division of Honda was using images of her ferrofluid art
23 in its advertisements. (SAC ¶ 21.) RPA assured Plaintiff that her
24 works were not featured in the ads, but offered Plaintiff a \$10,000
25 "creative consultant fee." (Id. ¶ 24.) Plaintiff then filed this
26

27 ¹ Muromura alleges that nine photographs of the original
28 "Protrude Flow" works were copyrighted, though the Copyright Office
cannot locate deposit copies. (SAC ¶ 8; Ex. 2.)

1 copyright infringement action against RPA and Honda. This court
2 granted Defendants' motions to dismiss both the original and First
3 Amended Complaint, both times with leave to amend. Defendants now
4 move to dismiss the Second Amended Complaint.

5 **II. Legal Standard**

6 A complaint will survive a motion to dismiss when it contains
7 "sufficient factual matter, accepted as true, to state a claim to
8 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
9 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
10 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
11 "accept as true all allegations of material fact and must construe
12 those facts in the light most favorable to the plaintiff." Resnick
13 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
14 need not include "detailed factual allegations," it must offer
15 "more than an unadorned, the-defendant-unlawfully-harmed-me
16 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
17 allegations that are no more than a statement of a legal conclusion
18 "are not entitled to the assumption of truth." Id. at 679. In
19 other words, a pleading that merely offers "labels and
20 conclusions," a "formulaic recitation of the elements," or "naked
21 assertions" will not be sufficient to state a claim upon which
22 relief can be granted. Id. at 678 (citations and internal
23 quotation marks omitted).

24 "When there are well-pleaded factual allegations, a court should
25 assume their veracity and then determine whether they plausibly
26 give rise to an entitlement of relief." Id. at 679. Plaintiffs
27 must allege "plausible grounds to infer" that their claims rise
28 "above the speculative level." Twombly, 550 U.S. at 555.

1 "Determining whether a complaint states a plausible claim for
2 relief" is a "context-specific task that requires the reviewing
3 court to draw on its judicial experience and common sense." Iqbal,
4 556 U.S. at 679.

5 **III. Discussion**

6 A Plaintiff bringing a copyright infringement claim must
7 adequately allege "(1) ownership of a valid copyright, and (2)
8 copying of constituent elements of the work that are original."
9 Feist Pubs., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361
10 (1991). To satisfy the copying prong, a copyright plaintiff must
11 also allege that the works are substantially similar in their
12 protected elements. Wild v. NBC Universal, Inc., 788 F.Supp.2d
13 1083, 1098 (C.D. Cal. 2011). The key issue in this case, at this
14 stage, is whether the elements Defendants allegedly copied are
15 protectable in the first instance.

16 To determine whether works are substantially similar, courts
17 in this circuit apply a two-part analysis comprised of an objective
18 "extrinsic test" and a subjective "intrinsic" test. Cavalier v.
19 Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002). The
20 intrinsic test is left to the jury. Id. at 484. In conducting the
21 extrinsic test, courts must make an objective comparison of
22 specific expressive elements. Cavalier, 297 F.3d at 822. Such a
23 comparison may require an "analytical dissection" of a particular
24 work. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th
25 Cir. 2000). As the Ninth Circuit has acknowledged, "the extrinsic
26 test provides an awkward framework to apply to copyrighted work
27 like music or art objects" Swirsky v. Carey, 376 F.3d 841,

1 848 (9th Cir. 2004). Nevertheless, the test is applicable to such
2 works. Id.

3 It is the plaintiff's burden to initially identify specific,
4 objective elements. Three Boys, 212 F.3d at 485. The court's
5 analytical dissection must, however, distinguish between protected
6 and unprotected elements in the work. Swirsky, 376 F.3d at 845.
7 "[W]hen applying the extrinsic test, a court must filter out and
8 disregard the non-protectible elements in making its substantial
9 similarity determination." Cavalier, 297 F.3d at 815. As
10 explained in this court's prior orders, copyright protection does
11 not "extend to any idea, procedure, process, system, method of
12 operation, concept, principle, or discovery." 17 U.S.C. § 102(b).
13 Therefore, "elements of expression that necessarily follow from an
14 idea, or expressions that are as a practical matter, indispensable
15 or at least standard in the treatment of an idea are [also] not
16 protected." Dream Games of Arizona, Inc. v. PV Onsite, 561 F.3d
17 983, 988 (9th Cir. 2009) (internal quotation and alteration
18 omitted); see also Satava v. Lowry, 323 F.3d 805, 810 (9th Cir.
19 2003) ("Similarly, expressions that are standard, stock, or common
20 to a particular subject matter or medium are not protectable under
21 copyright law.") (emphasis added); see also Swirsky, 376 F.3d at
22 850 ("[W]hen certain commonplace expressions are indispensable and
23 naturally associated with the treatment of a given idea, those
24 expressions are . . . not protected by copyright.").

25 In this vein, as the Satava court explained, objective facts
26 are not copyrightable. Satava, 323 F.3d at 810. The court
27 therefore held that a sculptor of jellyfish artworks could not
28 copyright such naturally-dictated elements as bright colors,

1 tentacles, vertical swimming orientation, clear glass
2 representative of water, or other elements typical of jellyfish in
3 nature. Id. at 811-12. While the court recognized that some
4 artistic choices derived from nature, such as the particular curl
5 of a jellyfish's tendrils, might be entitled to some copyright
6 protection, it explained that, given the limited range of possible
7 expressions of curled tendrils, such an element would be entitled
8 to only "thin" protection from only "virtually identical copying."
9 Id. Even unprotectable elements, however, may gain some protection
10 in combination with each other. Specific combinations of
11 unprotectable elements may be copyrightable, provided that the
12 elements combined "are numerous enough and their selection and
13 arrangement original enough that their combination constitutes an
14 original work of authorship." Id. at 810.

15 In this case, the court concluded that previous iterations of
16 Plaintiffs' complaint impermissibly attempted to lay claim to
17 fundamental properties of ferrofluid, such as its tendency to pool,
18 flow, or react to the presence of a magnet. The court therefore
19 found such elements to be either unprotectable or, at best, worthy
20 of only thin protection.² Now, with their lengthier Second Amended
21 Complaint, Plaintiffs include additional visual exhibits and
22 additional, more detailed descriptions of the works and elements at
23 issue.

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26 ² Plaintiffs' First Amended Complaint suffered from a degree
27 of imprecision regarding the works, let alone elements, at issue,
28 as evinced by Plaintiffs' identification of only a single still
photograph, in addition to the Protrude, Flow 2001 audiovisual
work.

1 Plaintiffs' Second Amended Complaint, however, continues to
2 suffer from a lack of clarity regarding the protectable elements
3 reflected in Plaintiffs' works. At a general level, Plaintiffs
4 provide extensive lists of descriptors and elements characterizing
5 their works, but at the same time allege that "[t]hese
6 articulations of the objective manifestations of Plaintiffs'
7 expression are provided, without limitation, as examples to
8 demonstrate sufficient objective similarities" (SAC ¶ 34).
9 With respect to specific photographs, Plaintiffs allege that
10 "[s]ome of the objective manifestations of the creative expression
11 that were copied by Defendants include the slope of the mountain
12 [shape], the density of spikes on the mountain, the way the spikes
13 protrude vertically . . . , the shape of the spikes, the horizon
14 line . . . , the mood of the pieces . . . and the open air
15 environment." (SAC ¶ 45.)

16 Such allegations, however, put the cart before the horse.
17 Plaintiffs cannot merely allege that Defendants' works share
18 certain elements with Plaintiffs' works.³ The threshold question
19 is whether any elements, or combinations of elements, are
20 protectable in the first instance. Plaintiffs skip ahead to a
21 description of "some" of the elements present in both works without
22 first identifying any elements or particular combination of
23 elements worthy of protection. Many of the individual expressions
24 identified, such as "mood," with no further elaboration, are not
25 the type of objective elements that the extrinsic test requires.

27 ³ Plaintiffs acknowledge that their claims do not depend on
28 the actual use of ferrofluid, and apply regardless of medium to any
depiction of the elements described in the SAC, such as they are.

1 Plaintiffs may not avoid their burden to identify protectable
2 elements by alleging, as they do, that discovery will do so. (E.g.,
3 "Plaintiffs contend that discovery will support their claim that
4 [a] hexagonal image of small vertical protrusions is copyrightable
5 expression" (SAC ¶ 62.)) Even if such descriptions were
6 sufficient to adequately identify a protectable combination of
7 elements, the SAC muddies the waters by alleging that the exhibits
8 described are intended only "as a few examples that serve to
9 demonstrate that Defendants (sic) works are extrinsically similar
10 to Plaintiffs' work" (SAC ¶ 56.) With such vague and
11 qualified allegations, it is difficult for this court determine the
12 set of elements, whether individually or as a combination, to which
13 Plaintiffs stake a claim. Because Plaintiffs have failed to meet
14 their burden to identify specific, objective, protectable elements,
15 the SAC must be dismissed.

16 **IV. Conclusion**

17 For the reasons stated above, Defendants' Motions to Dismiss
18 are GRANTED. The Second Amended Complaint is DISMISSED, with
19 prejudice.

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22 IT IS SO ORDERED.

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25 Dated: April 15, 2015


DEAN D. PREGERSON
United States District Judge